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CONTINGENT REMAINDERS

A N act recently passed in Massachusetts puts an end there to the rule of the common law whereby a contingent remainder failed if it did not vest during the continuance of the particular estate or at the instant when that estate determined. The act also provides that such remainders shall be governed as regards remoteness by the rule against perpetuities, to the exclusion of any such rule as that laid down in *Whitby v. Mitchell*,¹ respecting limitations to successive generations.²

The common law rule had been previously modified by statute in 1836 to the extent that a contingent remainder would not be defeated by the destruction of the preceding estate by dissesin, forfeiture, surrender, or merger,³ but it would still have failed if it was not ready to take effect upon the natural termination of the preceding estate. The commissioners who recommended this statutory provision pointed out how unjust and absurd it was that the intention of a testator or grantor should be defeated if the preceding estate determined before the happening of the contingency upon which the remainder depended. But the remedy they provided extended only to the case where the preceding estate deter-

¹ 42 Ch. D. 494 (1889); 44 Ch. D. 85 (1890).

² ACTS 1916, c. 108. By § 1, "A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executorial devise or a springing or shifting use, and shall, as well as such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." The application of the act is limited by § 2 to instruments executed after its passage and wills and codicils thereafter revived or confirmed.

³ REV. STAT. 1836, c. 59, § 7; REV. LAWS 1902, c. 134, § 8. *Purefoy v. Rogers*, 2 Saund. 380, 387, 388 (1670), is an instance of a contingent remainder defeated by the premature determination of the particular estate. A testator had devised lands to his wife for her life and, if she should have a son and call it by his name, he gave them to him after her life. She afterwards married again and she and her husband purchased the reversion from the testator's heir before she had a son. Her estate for life was held to be merged in the reversion, and the contingent remainder to her son destroyed. See also 2 BL. COMM. 171.

mined prematurely, and not to the case where it determined naturally by its own limitation, before the contingency happened.

A similar course was pursued in England, where an act was passed in 1845,⁴ containing, among other things, a provision regarding contingent remainders substantially the same as that in the Massachusetts statute of 1836.

In the previous year however an act had been passed in England which dealt more completely with the mischief incident to contingent remainders. A section of this act provided that every estate which previously would have taken effect as a contingent remainder should thereafter take effect, if in a will, as an executory devise, or, if in a deed, as an executory estate of the same nature as an executory devise, and provision was also made against the destruction of existing contingent remainders by the premature determination of the preceding estate.⁵ This act, which contained other provisions for simplifying the transfer of property, met with much criticism.⁶ As to the section relating to contingent remainders, one writer described it in the Law Magazine as "a most alarming clause,"⁷ while another, Mr. Bellenden Ker, in a diffuse letter to the Lord Chancellor, undertook to show the difficulties of understanding or applying the clause. The shallowness of his objections was afterwards exposed by an eminent conveyancer, who in an article published in the Jurist pronounced the section to be "per-

⁴ 8 & 9 VICT. c. 106, § 8.

⁵ 7 & 8 VICT. c. 76. It was provided by § 8, "That after the Time at which this Act shall come into operation no Estate in Land shall be created by way of contingent Remainder; but every Estate which before that Time would have taken effect as a contingent Remainder shall take effect (if in a Will or Codicil) as an executory Devise and (if in a Deed) as an executory Estate of the same Nature and having the same Properties as an executory Devise; and contingent Remainders existing under Deeds, Wills, or Instruments executed or made before the Time when this Act shall come into operation shall not fail, or be destroyed or barred, merely by reason of the Destruction or Merger of any preceding Estate, or its Determination by any other Means than the natural Effluxion of the Time of such preceding Estate, or some Event on which it was in its Creation limited to determine."

⁶ 8 JUR., pt. 2, pp. 289, 361, 407; 32 LAW MAG. 159-61; 9 JUR., pt. 2, pp. 2, 228; 10 JUR., pt. 2, pp. 2, 14.

⁷ The writer in the LAW MAGAZINE was disturbed chiefly because the clause, as he read it, made it impossible to create a contingent remainder, and yet made it equally impossible to create an executory estate without creating a contingent remainder; and, again, because it provided that a contingent remainder should take effect as an executory devise, although by the rules governing an executory devise, it might be void (32 LAW MAG. 160). His criticism was sufficiently answered in 9 JUR., pt. 2, p. 2.

haps the plainest enactment that ever appeared on the statute book.”⁸ But the opposition led to the passing of the act of the following session, repealing this section and substituting for it a provision which only saved a contingent remainder from destruction by reason of the forfeiture, surrender, or merger of any preceding estate.⁹ If however this section of the act of 1844 had not been so repealed, most of the misfortunes that have since been experienced in regard to contingent remainders would have been averted.

⁸ 10 JUR., pt. 2, pp. 14–16. This article is signed with the initials “G. S.” and it may fairly be inferred that the author was the late George Sweet. The following specimen is there quoted from Mr. Ker’s letter: “As a contingent devise or use, though by way of remainder, is necessarily unexecuted (while an executory devise or use is not necessarily contingent), the term ‘executory’ does not, in strictness, ascertain the peculiar species of limitation with which, by this enactment, all contingent remainders, whether created at the common law or by way of use or devise, are intended to be identified. The executory devise or estate to which reference is intended to be made is, of course, a contingent devise or use, so limited as to be incapable of taking effect as a remainder; and the true interpretation, therefore, of the enactment is, that ‘a contingent limitation by way of remainder, whether created at the common law or under the Statute of Uses, or by devise, shall take effect in the very same manner as a contingent use or devise not limited by way of remainder.’ Now, in order to satisfy the terms of this enactment, it appears to be necessary that we should, in the first place, apply the learning of contingent remainders, for the purpose of ascertaining whether the given limitation would, under the old law, have taken effect as a contingent remainder or not; and, in the next place, apply the learning of executory devises or uses for the purpose of inventing an hypothesis adequate to give that limitation all the effect of an executory devise or use. And we must, if possible, so work out this process, as that, while we attribute to the limitation (for this the enactment expressly requires) all the peculiar qualities of an executory devise or use, none of the beneficial properties which the same limitation, taking effect as a remainder, would have possessed, may be sacrificed. But, having ascertained that the given limitation would have been valid as a contingent remainder, then, as it is of the very essence of an executory devise or use to have (in contradistinction to a remainder) a substantive self-dependent existence, and to be incapable of taking effect as a remainder, we are compelled to disconnect the limitation, in construction or supposition of law, from the particular estate.” The whole of this letter is printed in several of the early editions of DAVIDSON, CONCISE PRECEDENTS (2–5 ed.). It would have been more useful to have printed Mr. Sweet’s answer to it, in which, after saying that, as the text of the act conveys its meaning much more shortly and with greater perspicuity than Mr. Ker’s commentary, the latter must be regarded as a piece of mere mystification, he proceeds to discuss the provisions of the act and to show how groundless were the difficulties imagined by Mr. Ker (10 JUR., pt. 2, pp. 14–16).

⁹ In SWEET, CONVEYANCING STATUTES OF 8 & 9 VICT. (1845), p. 1, the author says of the later act: “The last-mentioned statute has effected a retrograde step in law reform; it has repealed some useful provisions of the act of the preceding session, and, without settling any of the doubts which exist as to the construction of that act, has substituted for many of its clauses others not better in design and much more inaccurate in expression.” See also 61 L. T. 335 (1876).

In 1843, shortly before these statutes, the case of *Festing v. Allen*¹⁰ had been decided. There a testator had devised his lands to certain persons and their heirs to the use of his granddaughter during her life and after her decease to the use of all her children who should attain the age of twenty-one years, as tenants in common, and their heirs. The granddaughter survived the testator and died leaving three minor children. As there was no gift except to children who attained twenty-one and there was no child answering that description when the granddaughter's estate determined, it was held that the remainder was necessarily defeated. This case must have been present to the minds of the authors of the act of 1844, and under its provisions no such calamity could ever have happened in the case of any future will or deed. Under the act of 1845 the same thing was very likely to happen and actually did happen.

The difference between a contingent remainder and an executory estate (*i. e.*, a springing or shifting use or an executory devise) was that a contingent remainder depended upon the continued existence of a preceding estate of freehold until it vested, while an executory estate was entirely independent of the existence of any previous estate or interest.

This rule regarding contingent remainders was a result of the simplicity of the forms of conveyance allowed by the common law. The owner of a present estate of freehold could convey the land only by a feoffment with livery of seisin, which meant an actual delivery of the feudal possession of the land.¹¹ He could not convey it for an estate to commence in the future and retain the land in the meantime, because that was inconsistent with the present delivery of the seisin. The only occasion on which a future estate could be created was when a present feoffment was made with livery of seisin to someone for an estate less than a fee simple. A provision might then be added that upon the determination of that estate the land, instead of reverting to the feoffor, should *remain* to another for some other estate. The future estate during which the land was so to remain away from the feoffor was called a *remainder*.¹² It was not admissible that there should be any inter-

¹⁰ 12 M. & W. 279, 300 (1843); WILLIAMS, SEISIN, 200.

¹¹ 2 BL. COMM. 310-14; 2 POLLOCK & MAITLAND, ENG. LAW, 82-84; WILLIAMS, REAL PROPERTY, 13 ed., 143 (the last edition prepared by the author).

¹² Mr. Maitland has shown that the word *remainder* is not applied to the estate because it is a remnant or part of the feoffor's estate that is left over when a particular

val between the present estate and the remainder, for, if there were, the land could not at the end of the present estate remain to the new owner, but would immediately revert to the feoffor, or, if there was a subsequent vested remainder, it would go to the remainderman. When the time arrived afterwards for the future estate to take effect, the land could not then *remain* to the person for whom it was intended, because it would have already reverted to the feoffor, or passed to the owner of the vested remainder, and the law provided no means whereby it could be got away from him without a new conveyance.¹³ Accordingly, if a contingent remainder was still contingent when the previous estate came to an end, it failed entirely.

Executory estates derived their origin from uses, which required at common law a seisin in some person other than the one that had the use. They might therefore be created and transferred independently of the seisin. The owner of a piece of land might enfeoff one person to the use of another upon a contingent event, either disposing of the use in the meantime or leaving it wholly or partly undisposed of. So far as the use was not disposed of, it would

estate has been taken out, but that it derives its meaning from the language of the conveyance, which was that the land, after the determination of the particular estate, should *remain* to another for a specified estate. Any remnant of the feoffor's estate not disposed of was called the *reversion*. 2 MAITLAND, COLL. PAPERS, 178, 180 (6 L. QUART. REV. 25); 2 POLLOCK & MAITLAND, ENG. LAW, 21; FLETCHER, CONTINGENT REM. 7. The Latin word employed in conveyances was *remanere*, but Lord Coke's connection of the word with *remnant* seems to have been a fanciful one and not in accord with the use of *remanere* in conveyances (Co. LIT. 143 a). The following is a form of feoffment with remainders in MADOX, FORMULARUM ANGLICANUM, 409: "Know &c. that we [the feoffors] have delivered, enfeoffed, and by this present charter confirmed to Mary Howard our manor of Peldon, &c. To have and to hold all the said manor &c. to the said Mary for the term of her life; And after the decease of the said Mary the said manor &c. shall *remain* (*remaneant*) to John Teye and the heirs of his body lawfully begotten; And if it happen that the said John Teye die without heir of his body lawfully begotten then the said manor &c. shall *remain* to Robert Teye and the heirs of his body lawfully begotten; And if it happen that the said Robert Teye die without heir of his body lawfully begotten then the said manor &c. shall *remain* to Grace and Constance daughters of J. T. and the heirs of their bodies lawfully begotten; And if it happen that the said Grace and Constance die without heir of their bodies lawfully begotten then the said manor &c. shall wholly *revert* (*revertantur*) to us the said [feoffors] and our heirs and assigns forever; In witness &c." [25 HEN. 6]. See also other forms, *id.*, pp. 401-12. In making a feoffment the verb "enfeoff" (*feoffare*) was seldom employed, and the usual phrase was "give and grant" (*dare et concedere*) (2 POLLOCK & MAITLAND, ENG. LAW, 82). It is unnecessary to provide for the *reversion*, but it was often done (*Id.*, 7).

¹³ WMS. R. P., 13 ed., 271-73; FEARNE, CON. REM. 281, 504-505.

result to the feoffor, and when the contingent event happened, the feoffee would hold the land to the use that would then spring up. If the use was disposed of until the contingent event, then it would shift upon the happening of the event. The owner might also, without parting with the seisin, create a future use by a bargain and sale of the land from a future time or contingent event,¹⁴ or by a covenant that he would thereafter stand seised of the land to the use of another.¹⁵ In all these cases the persons that had the seisin were bound to deal with the land in accordance with the wishes of those that had the use.

The Statute of Uses¹⁶ transferred the seisin and possession from the persons in whom it was vested to the persons entitled to the use for the like estate as they had in the use, but it did not attempt to interfere with the creation of uses. Land might still be limited to uses in the same manner as before the passage of the act and the uses would become by force of the statute legal interests. A future use would become a future legal interest, and would be valid although there might be no preceding estate. But where a use for a freehold interest was preceded by an estate that would support a contingent remainder, the common law courts gave to the legal estate into which the use was converted the same effect as if it had been limited, as at common law, by way of remainder after the preceding estate without any mention of uses. A feoffment to the use of one for life and after his death to the use of his children who should attain the age of twenty-one years, in equal shares, had accordingly the same effect as if the feoffment had been made to the same person for life with remainder to his children attaining that age in like manner. The future use, having become a legal estate, had the incidents of the like estate at common law, and, if it was still contingent when the preceding estate determined, it failed to take effect at all. Accordingly it was an established rule of law "that no limitation shall be construed to be an executory or shifting use which can by possibility take effect by way of remainder."¹⁷ It was plain that

¹⁴ 1 SANDERS, USES, 142; 7 BACON'S WKS. (Spedding's ed.), USES, 440; Davis v. Speed, 12 Mod. 39 (1694); GRAY, PERPETUITIES, 3 ed., § 56.

¹⁵ Co. Lit. 271 b, Butler's note, VI, 1; GILBERT, USES (Sugden's ed.), 92, 108.

¹⁶ 27 HEN. VIII, c. 10.

¹⁷ Cole v. Sewall, 4 Dr. & War. 1, 27 (1843); 2 Con. & Law. 344, 359; Carwardine v. Carwardine, 1 Eden 27, 34 (1757); GILBERT, USES (Sugden's ed.), 176; FEARNE, CON. REM. 392; BURTON, COMPENDIUM, 7 ed., 261.

this rule disregarded the intention of the settlor, for it was never doubted that it was intended in such cases as that just mentioned that all the children should be entitled whenever they attained the specified age. But at common law effect could not be given to this intention, unless they had attained that age when the preceding estate determined. And when the statute turned the use into a legal estate, the courts of law applied to it the same rules that had previously governed legal estates, if the estate was one that could have been created at common law. It was only in the case of springing and shifting uses, which did not correspond to any common law estates, that the rules of the Court of Chancery continued to be applicable.¹⁸

Executory devises were formed on the model of springing uses.¹⁹ At common law there was no power of disposing of land by will, except in some places by custom.²⁰ But the purpose of a will was accomplished by a feoffment to the use of the feoffor and his heirs or to the uses of his will, and the Court of Chancery, which allowed a devise of the use, would compel the feoffees to deal with the land according to the will.²¹ When however the Statute of Uses turned the use into a legal estate, it became property that the owner had no power to devise.²² The inconvenience of thus taking away a power to which people had become accustomed soon led to the passing of the Statute of Wills.²³ After this statute, by an indulgence in favor of wills, a testator was permitted to make a devise directly and without the interposition of a third person for any interest that might previously have been created by a springing or shifting use, and such a limitation was called an executory devise.²⁴

¹⁸ *White v. Summers*, [1908] 2 Ch. 256, 262-65.

¹⁹ BURTON, COMPENDIUM, 7 ed., 104; *Purefoy v. Rogers*, 2 Saund. 388, note.

²⁰ 2 BL. COMM. 374; BURTON, COMPENDIUM, 7 ed., 91; WMS. R. P., 13 ed., 205.

²¹ MADOX, FORMULARIS ANGLICANUM, 438, gives a form of will (2 HEN. 7) in which, after reciting a feoffment to the use of the testatrix and her heirs and to perform and fulfill her will, she proceeded to declare the manner in which the feoffees should deal with the lands. For examples of bills to enforce the uses, see SELECT CASES IN CHANCERY (Selden Soc.), cases 118, 127.

²² 2 BL. COMM. 375; BURTON, COMPENDIUM, 7 ed., 91; WMS. R. P., 13 ed., 205. But see BACON, USES (Rowe's ed., 1806), 140, note 80.

²³ 32 HEN. VIII, c. 1; 34 HEN. VIII, c. 5; 2 BL. COMM. 375; BURTON, COMPENDIUM, 7 ed., 91; WMS. R. P., 13 ed., 205.

²⁴ FEARNE, CON. REM. 386; BURTON, COMPENDIUM, 7 ed., 104; WMS. R. P., 13 ed., 316-17; *Purefoy v. Rogers*, 2 Saund. 388, note.

In all other respects, executory devises followed the analogy of springing and shifting uses. And the like maxim was established regarding them, that, whenever an estate can take effect as a contingent remainder, it shall never be construed as an executory devise.²⁵

The consequences of this rule are shown by considering its application to a case in which land is limited to the use of a living person for his life and after his death to the use of his children attaining twenty-one in equal shares in fee simple, or a devise directly to such persons for similar estates. The estate limited to the children is a contingent remainder, whether it is limited to them directly or as a use, for it is an estate that might have taken effect as a remainder if it had been limited to them at common law. If at the death of the life tenant none of his children has attained twenty-one, then the estate limited to them fails entirely.²⁶ If one or more of them has attained twenty-one, the remainder would have vested in them successively as they attained that age, and they take the whole at the death of the life tenant to the exclusion of any others who may then be under that age.²⁷ The rule would be applicable in the same way if the remainder were limited to such children as should attain the age of twenty-five.²⁸ But the result would be entirely different if the land were limited to trustees in trust for the same persons for like interests. The legal estate would be vested in the trustees, who would have a continuing seisin, and the ground of the rule of the common law would not exist. In the case of such a trust for children attaining twenty-one, all that attained that age at any time, either before or after the death of the tenant for life, would be entitled, and, if there were children and none of them had attained twenty-one at that time, the beneficial interest would result in the meantime, just as a use would have done before the Statute of Uses. If the trust were for such children as should attain twenty-five, then it would be wholly invalid, for the children might not be ascer-

²⁵ *Purefoy v. Rogers*, 2 Saund. 380, 388; *Goodtitle v. Billington*, 2 Doug. 753, 758 (1781); *FEARNE, CON. REM.* 267, 386. This rule was often laid down in Massachusetts; *Nightingale v. Burrell*, 15 Pick. 104, 110 (1833) (Shaw, C. J.); *Terry v. Briggs*, 12 Met. 17, 22 (1846) (Wilde, J.); *Hall v. Priest*, 6 Gray 18, 20 (1856) (Bigelow, J.).

²⁶ *Festing v. Allen*, 12 M. & W. 279, 300 (1843); 1 *JARM., WILLS*, 6 ed. (1910), 328; 1 ed., 229.

²⁷ *FEARNE, CON. REM.* 312; *Festing v. Allen*, 12 M. & W. 279, 301 (1843).

²⁸ *Symes v. Symes*, [1896] 1 Ch. 272; 1 *JARM., WILLS*, 6 ed., 328; 1 ed., 230.

tained within the time allowed by the rule against perpetuities, and none of them could take any interest under it.²⁹

In the case of *Cunliffe v. Brancker*,³⁰ which was decided in 1876, a testator, who died in 1817, had devised certain lands to two persons and their heirs and assigns to the use of themselves for the term of one hundred and twenty years, if his niece Sarah Cunliffe should so long live, upon trust to pay her the rents and profits for her separate use, and from the expiration of that term and subject thereto to the use of her husband John Cunliffe during his life, and after his decease to the use of all the children of Sarah Cunliffe who should be living at the decease of the survivor of the husband and wife, and the issue then living of such of them as should be then dead, and their heirs and assigns, as tenants in common, the issue taking their parents' share, with remainders over in default of any child or issue then living. The husband died in the lifetime of his wife, and upon her death leaving several children the question arose whether the limitation to the children failed for want of a particular estate of freehold to support it after the death of the husband.³¹ Jessel, M. R., said:

"This is a case in which, according to my view, the intention of the testator fails on account of a feudal rule of law which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, so that if until the time of the determination or cesser of the prior estates of freehold the remainder has not vested, it fails in spite of the intention of the settlor or testator. This has nothing to do with the intention. It always disappoints the intention, because every settlor, or testator, intends the contingent remainder to take effect. This is an arbitrary feudal rule, one of the legacies of the Middle Ages which has come down to our times, and which, not having been interfered

²⁹ *Abbiss v. Burney*, 17 Ch. D. 211 (1881). See also *Pearks v. Moseley*, 5 A. C. 714 (1880); *Hall v. Hall*, 123 Mass. 120, 124 (1877).

³⁰ 3 Ch. D. 393, 399, 401.

³¹ The term of years determinable on the death of the wife was still subsisting, but a term of years cannot support a contingent remainder. 2 BL. COMM. 171; CHALLIS, R. P., 1 ed., 93; 3 ed., 119. If Sarah Cunliffe had died before her husband, his life estate would have supported the contingent remainders until they vested at his death, as in the case of another devise in the same will in precisely the same terms, substituting the names of Mary Ann Grundy and her husband for those of Sarah Cunliffe and her husband (3 Ch. D. 394, 398).

with by the Legislature, I cannot interfere with. . . . No children are to take except children of *Sarah* who should be living at her decease. . . . It is quite true that the testator probably never heard of this rule of law, but I think his conveyancer did who drew the will, for it is a will drawn by a lawyer, and the conveyancer made a mistake, he overlooked the fact that if *John Cunliffe* died before his wife there would be no freehold to support the contingent remainders."

He therefore declared that he was bound by the rule to disappoint the intention by holding that the contingent remainder failed for want of a sufficient estate to support it, and his decision was affirmed by the Court of Appeal (James, Mellish, and Baggallay, L. J.).

The effect of the rule might generally be avoided by adding an alternative limitation that could only take effect as an executory estate in favor of those who would otherwise be disappointed. For example, in *In re Lechmere and Lloyd*,³² there was a devise to a granddaughter for her life and after her death to such children of hers then living and such issue then living of her children then deceased, as either *before* or *after* her decease should attain twenty-one or, in the case of females, marry, in fee simple as tenants in common. The granddaughter died leaving children some of whom had attained twenty-one and others were infants and unmarried. Jessel, M. R., held that there were two distinct classes as objects of the devise, one being the children ascertained at the death of the tenant for life, and the other being children ascertained after her death. As to the former class the gift might take effect as a remainder, but as regards the latter class it could not possibly take effect except as an executory devise. Consequently the children who had attained twenty-one took vested interests liable to open and let in the others on their fulfilling the conditions. The same principle was afterwards applied by Kay, J., in *Miles v. Jarvis*,³³ and by Chitty, J., in *Dean v. Dean*.³⁴ But the court cannot supply the alternative limitation if it is not expressed, although the devise might have been so divided by the testator that it would operate as a contingent remainder in some events or as to some of the persons described, and as an executory devise in other events or as to other persons.³⁵

³² 18 Ch. D. 524 (1881).

³³ 24 Ch. D. 633 (1883).

³⁴ [1891] 3 Ch. 150.

³⁵ For other illustrations of the rule regarding alternative limitations, see *Evers v. Challis*, 7 H. L. Cas. 531, 547, 550, 552, 555 (1859); *Doe v. Selby*, 2 B. & C. 926, 930 (1824); *Miles v. Harford*, 12 Ch. D. 691, 702-04; *Hancock v. Watson*, [1902] A. C. 14; *Gray v. Whittemore*, 192 Mass. 367, 372, 78 N. E. 422 (1906).

Accordingly in *White v. Summers*,³⁶ where there was a devise to John Bowen for life, and after his decease "to the use of the eldest or other son of the body of my nephew James Summers . . . who shall first attain or have attained the age of twenty-one years" in tail, and at the death of the tenant for life the eldest son of James Summers had not attained that age, Parker, J., held that the devise to the son was a contingent remainder and failed. The devise, he said, was clearly intended to take effect if the son attained twenty-one, whenever that event happened, but the contingency was such that it might happen before the determination of the preceding estate, and as there was nothing from which he could infer an intention to create an alternative gift not to take effect upon the determination of the estate, the devise must be held to be a contingent remainder, although the intention of the testator would be thereby defeated.³⁶

It is said that the decision in *Cunliffe v. Brancker* led to the passing of the Contingent Remainders Act in 1877.³⁷ This act provided that a contingent remainder which would have been valid as a springing or shifting use or executory devise, had it not had a sufficient estate to support it, should, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect as if it had originally been created as a springing or shifting use or executory devise.³⁸ Before the bill on which the act was founded was brought in, and very shortly after the decision in *Cunliffe v. Brancker*, a bill was prepared by Joshua Williams, by which he proposed that a contingent remainder should take effect, notwithstanding the want of a particular estate to support it, in the same manner as if it were an equitable estate, and should be governed by the rules as to invalidity by reason of remoteness which govern equitable estates.³⁹ His bill however was not adopted. As he pointed out, the act which was passed did not apply to a gift of land to one for life with remainder to his children who should attain twenty-five, for the remainder would be void for remoteness as an executory limitation, if there had not been a partic-

³⁶ *White v. Summers*, [1908] 2 Ch. 256. A leading article on this case appeared in the SOLICITORS' JOURNAL of 11th April, 1908 (52 SOL. J. 408).

³⁷ CHALLIS, R. P., 1 ed., 112; 3 ed., 141; 61 L. T. 335, 371 (1876); 22 SOL. J. 332 (1878).

³⁸ 40 & 41 VICT. c. 33; WMS., SEISIN, 205.

³⁹ The bill is printed in WMS., SEISIN, 207, and 62 L. T. 312. See also 61 *Id.* 371.

ular estate to support it. Accordingly, if one or more of the children attained twenty-five before the death of the tenant for life, they would take the whole to the exclusion of others afterwards attaining twenty-five who were intended to take equally with them. Mr. Williams also asserted that, if a remainder was limited to the children of the tenant for life who should attain twenty-one and some of his children attained that age in his lifetime and others after his death, the remainder would vest wholly in those that had attained twenty-one at his death and the others would be excluded, because the act applied only in the event of the particular estate determining "*before* the contingent remainder vests."⁴⁰ But the Solicitors' Journal said of this criticism: "If that is so, the Act is a failure, for the inconvenience it was intended to remedy seldom arose except under gifts to classes," and this opinion was echoed by the Law Times,⁴¹ which added that such a vesting was not the vesting spoken of by the act, and that, when it referred to the particular estate determining before the contingent remainder vests, it was speaking of those who but for the act would have been disappointed and in interpreting the statute the old law and the mischief to be provided against ought to be borne constantly in mind. A series of letters in the Solicitors' Journal followed, in which Mr. Williams's eminent contemporary, George Sweet, took part and maintained that the words of the act referred to the case of the particular estate determining before the contingent remainder had vested in all the persons in whom it would have vested if the particular estate had not determined, and that they were not limited to the case where there had been no vesting in any of them.⁴² This question has not yet been judicially determined. It was lately raised in the case of *In re Robson*,⁴³ before Astbury, J., where a testator had devised a house to his daughter for life and after her decease to such of her children as should attain twenty-one, as tenants in common, in fee simple. Two of her children had attained twenty-one at her death and two others were still minors. The judge pointed out that, if the children had all been infants at the death of the life tenant, there would have been no difficulty, but,

⁴⁰ WMS., SEISIN, 206-07.

⁴¹ 22 SOL. J. 332 (23 Feb., 1878); 64 L. T. 328 (9 March, 1878).

⁴² The letters are as follows: 22 SOL. J. 544 (A. P. Whately); 562 (G. Sweet); 601, 622 (J. Williams); 640 (G. Sweet); 661 (J. Williams).

⁴³ [1916] 1 Ch. 116.

as two had attained twenty-one there was a question whether the contingent interests of the infants would be saved by the statute. He did not decide this point because the Land Transfer Act, 1897, vested the real estate of the testator in his personal representatives as trustees for the persons beneficially entitled to it, and so he held that the interests of the children were equitable ones, to which the rule of the common law did not apply.⁴⁴

Another evil attending contingent remainders was the rule, established in England in *Whitby v. Mitchell*,⁴⁵ that a contingent remainder could not be limited to the issue of an unborn person after a limitation to that person for his life, even though it was so limited that it must vest, if at all, within the period allowed by the rule against perpetuities. The rule was in that case laid down only as regards legal estates, but it was afterwards extended to similar equitable estates by *In re Nash*.⁴⁶ It was sometimes said to have originated in a rule against a possibility upon a possibility, but in the decision of the latter case the use of this phrase was disapproved. It is often spoken of as a rule against limiting land to unborn generations in succession. It was said to have become a fixed rule regarding legal estates in land, before the creation of executory interests showed the need for the rule against perpetuities to keep them within proper limits. But there was no useful purpose in having such a rule after the rule against perpetuities relating to the same matter had become established as to other interests. There is no case in this country, so far as the present writer knows, in which the existence of such a rule has been considered or mentioned in any judicial decision, but it has been discussed by Mr. Gray in his book on Perpetuities.⁴⁷ The rule however did not extend to executory limitations, as is shown by the decision of the House of Lords in *Cadell v. Palmer*,⁴⁸ where a series of executory devises of a long term of years to several successive generations of unborn persons was held to be

⁴⁴ This construction of the provisions of the Land Transfer Act, 1897, is criticised in a note in 32 L. QUART. REV. 3, which appears by the appended initials to have been written by Mr. Charles Sweet, and in an article on Assent by Executors in 60 SOL. J. 426.

⁴⁵ 42 Ch. D. 494 (1889); 44 Ch. D. 85 (1890).

⁴⁶ [1910] 1 Ch. 1; [1909] 2 Ch. 450.

⁴⁷ GRAY, PERPETUITIES, 3 ed., §§ 298 *a*, 931.

⁴⁸ 1 CL. & FIN. 372 (1833). The rule laid down in that case prevails in Massachusetts. Brattle Square Church Case, 3 Gray 142, 152 (1855); Odell v. Odell, 10 Allen 1, 5 (1865).

valid, as the vesting was confined to lives in being at the death of the testator and twenty-one years after. Accordingly, if the provision in the act of 1844 by which contingent remainders were turned into executory limitations⁴⁹ had not been so hastily repealed in the following year, there would not have been any such case as *Whitby v. Mitchell* or *In re Nash*, or any of the cases dependent on them. The limitations in question in those cases would have been converted into executory limitations, and their validity as regards remoteness would have been determined by the rule against perpetuities, by which other executory limitations are governed. There would have been no question of any other rule affecting their validity on the ground that they involved double possibilities or conferred interests on successive unborn generations.

In Massachusetts a case of *Simonds v. Simonds*⁵⁰ was decided in 1908, which involved the question whether a limitation to a class of persons after an estate for life could vest in any members of the class who were not ascertained when the particular estate determined. There was a conveyance by deed to Charles Simonds and his heirs and assigns to the use of himself during his life and after his death to the use of such of his children as should attain the age of twenty-one years, as tenants in common, and their heirs and assigns.⁵¹ He had five children, two of whom attained twenty-one in his lifetime, and one of the others attained that age after his death and two were

⁴⁹ 7 & 8 VICT. c. 76, § 8, *supra*, p. 227. See 61 L. T. 335.

⁵⁰ 199 Mass. 552, 85 N. E. 860 (1908). This case is criticised in GRAY, PERPETUITIES, 3 ed., § 927.

⁵¹ A grant to A. in fee simple to the use of himself for life has the same effect as a grant to another in fee simple to the use of A. for life, although in the former case A. is in for life by the common law, and in the latter case by the statute. In each case subsequent uses for other persons are executed by the statute. Bacon says: "if I give land to I. S. and his heirs, to the use of himself for life, or for years, and then to the use of I. D. or his heirs, I. S. is in of an estate for life, or for years, by way of abridgment of estate, in course of possession, and I. D. in of the fee-simple by the statute." 7 BACON'S WKS. (Spedding's ed.), USES, 440. See, to the same effect, 1 PRESTON, ESTATES, 176; GILBERT, USES (Sugden's ed.), 152; BURTON, COMPENDIUM, 7 ed., 47. The limitation to Charles Simonds in fee simple to the use of himself for life, vested in him the legal estate in fee simple at common law, but, as the use was confined to his life, the legal estate stayed in him only during that period. The subsequent use vested in his children as they attained 21 successively, until the class was closed, and the statute transferred the legal estate to them according to their respective estates in the use. His estate and that of his children were thus precisely the same as if the conveyance had been made to a third person and his heirs to the same uses. See also *Doe v. Passingham*, 6 B. & C. 305 (1827); 2 DAV., CONV., 3 ed., 176-77.

still minors at the time of the proceedings. The question was whether these three children were excluded from any interest because they had not attained twenty-one at the death of the tenant for life. It was held that the meaning was that, after the death of the tenant for life, the land should go to all his children who should reach the age of twenty-one years, regardless of the time when any of them might attain that age, and as only two of those who might ultimately attain twenty-one were then certain, effect might be given to the intention by way of a shifting use in favor of those who finally answered the description.⁵² The correctness of the interpretation given to the deed is beyond question and it cannot be doubted that the intention was carried out by the decision, but whether it could be so carried out consistently with the rule of law is a different matter. It is plain that the limitation to all the children who should attain twenty-one, whenever they might attain that age, was one that might have taken effect as a contingent remainder. It is also plain that there was not an alternative or separable limitation to those who should attain twenty-one after the death of the tenant for life, which could not have taken effect as a contingent remainder, or otherwise than as a springing or shifting use. The judgment disclaimed any intention of deciding anything at variance with what it described as the well-settled rule that a limitation, if it could so operate, was to be construed as a remainder, even if the rule applied with equal force to springing and shifting uses. The decision is put wholly upon the intention that the land should go to all the children who should ultimately attain twenty-one, and it certainly gave effect to that intention. The rule that was invoked to defeat the intention has now been done away with by the statute mentioned at the commencement of this article and there can be no question how any similar limitation in the future would be dealt with, although the case might be one in which resort could not be had to the Statute of Uses.

J. L. Thorndike.

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⁵² The case of *White v. Summers*, [1908] 2 Ch. 256 (*supra*, p. 236), in which the same questions were considered by Parker, J., six months previously, seems not to have been brought to the attention of the court.